IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 13, 2004 Session

MELANIE MILLSAPS v. RICHARD ROE, ET AL.

Appeal from the Circuit Court for Blount County
No. L-11617 W. Dale Young, Judge

No. E2003-02528-COA-R3-CV - FILED JULY 29, 2004

This litigation arises out of a 1993 motor vehicle accident. Melanie Millsaps ("the plaintiff") filed her first complaint on January 14, 1994. That suit was nonsuited without prejudice, and the present suit was filed on August 13, 1998, within the one-year period of the saving statute. The instant case languished for a number of years. By order entered April 9, 2003, the plaintiff's original attorney was allowed to withdraw. Her new–and present–counsel filed a notice of appearance on May 1, 2003. One of the defendants–State Farm Mutual Automobile Insurance Company ("State Farm"), who had been sued[1] in its capacity as the uninsured motorist carrier for the plaintiff – filed a motion for summary judgment on August 4, 2003. The motion was heard on September 5, 2003, and granted by order entered September 18, 2003.[2] The plaintiff appeals the trial court's grant of summary judgment to State Farm, contending that there are procedural deficiencies in the trial court's handling of State Farm's motion. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and H. DAVID CATE, SP.J., joined.

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[1] State Farm was named as a defendant in the complaint. The better practice is to serve the uninsured motorist ("UM") carrier without naming it as a defendant. The applicable statute clearly contemplates that the UM carrier will not be reflected as a named defendant. *See* Tenn. Code Ann. § 56-7-1206(a) (2000) ("Any insured intending to rely on the coverage required by this part shall . . . serve a copy of the process upon the insurance company . . . *as though* such insurance company were a party defendant.") (emphasis added). Naming the UM carrier as a party defendant in the complaint and making allegations with respect to it is also potentially inconsistent with Tenn. Code Ann. § 20-9-302 (2000) allowing counsel for a claimant "[i]n the trial of any civil suit . . . to read the counsel's entire [complaint] . . . to the jury at the beginning of the lawsuit, and [to] refer to the same in argument or summation to the jury." This inconsistency would arise if the UM carrier chose not to defend "in its own name." *See* Tenn. Code Ann. § 56-7-1206(a).

[2] By order entered October 15, 2003, the trial court decreed that "inasmuch as State Farm's motion for summary judgment has been granted, the subject cause of action is hereby dismissed as to all defendants with prejudice." This case is properly before us pursuant to the provisions of Tenn. R. App. P. 3(a).

Wm. Lee Gribble, II, Maryville, Tennessee, for the appellant, Melanie Millsaps.

Linda J. Hamilton Mowles, Knoxville, Tennessee, for the appellee, State Farm Mutual Automobile Insurance Company.

OPINION

I.

State Farm's motion for summary judgment is supported by a statement of undisputed facts and supporting documents. The thrust of State Farm's motion is that there is a "complete and total lack of evidence to support the [plaintiff's] allegation that a phantom vehicle(s) contributed to the subject collision."[3] The plaintiff does not argue that the material submitted by State Farm is insufficient to support a grant of summary judgment to State Farm.[4] Rather, the plaintiff contends that the trial court committed procedural errors that warrant reversal of the trial court's judgment.

The certificate of service accompanying State Farm's motion reflects that it was signed by counsel on August 4, 2003. The certificate recites that it was served on the plaintiff "by delivering a true and exact copy to the offices of counsel of record shown at the addresses below *or* by placing a copy in the United States mail, first-class postage prepaid." (Emphasis added).[5] The record is devoid of further evidence as to when and how the motion was actually served, other than the assertion of plaintiff's counsel that it was "found in counsel's mailbox along with counsel's other mail."

A hearing was scheduled on State Farm's motion for September 5, 2003. On the day of the hearing, the plaintiff filed a response to that motion.

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[3]The plaintiff sued State Farm pursuant to the uninsured motorist ("UM") statutory scheme, Tenn. Code Ann. § 56-7-1201, *et seq*., alleging that two phantom drivers, designated as "Richard Roe" and "John Doe" caused or contributed to the subject accident. The suit also sought judgment against two named parties. Under the applicable statute, if there is no "physical contact . . . between the motor vehicle owned or operated by such unknown person and the person or property of the insured" – and apparently there was none in this case – a plaintiff cannot invoke the UM statutory scheme unless it presents "clear and convincing evidence, other than any evidence provided by occupants in the insured vehicle," of the "[t]he existence of such unknown motorist." *See* Tenn. Code Ann. § 56-7-1201(e)(1)(B) (2000).

[4]The plaintiff does contend that the trial court did not reach the merits of State Farm's motion, but rather granted it solely because the plaintiff failed to file her response in a timely fashion. The record does not support this contention. The trial court's order granting summary judgment recites that the motion "is well taken." Furthermore, the order does not refer to the plaintiff's untimely filing. In any event, the material that was filed by State Farm establishes (1) that there was no contact between the phantom vehicles and the plaintiff's vehicle and (2) that there is no evidence – clear and convincing or otherwise – of the existence of the phantom vehicles.

[5]This case is a good illustration of why a certificate of service reciting that service was accomplished in one of two or more ways is not good practice. It should be noted that the certificate on State Farm's brief reflects that its counsel has now changed its certificate of service form so as to state with specificity how service was effected.

II.

The plaintiff first claims that Tenn. R. Civ. P. 56.04[6] and Tenn. R. Civ. P. 6.05[7] precluded the trial court from hearing State Farm's motion on September 5, 2003. Next, the plaintiff argues that the trial court abused its discretion when it granted summary judgment in favor of State Farm after refusing to consider her response to the motion for summary judgment, which response, as previously noted, was filed on the day of the hearing. Since the only issues before us raise questions of law, our review is *de novo* with no presumption of correctness as to the trial court's judgment. ***S. Constructors, Inc. v. Loudon Co. Bd. of Educ.***, 58 S.W.3d 706, 710 (Tenn. 2001).

III.

A.

Under Tenn. R. Civ. P. 56.04, a motion for summary judgement "shall be served at least thirty (30) days before the time fixed for the hearing"; however, if notice is sent by mail, Tenn. R. Civ. P. 6.05 mandates that "three days shall be added to the prescribed period." With respect to Rule 56.04, the Supreme Court has held as follows:

> The purpose of the rule is to allow the opposing party time to file discovery depositions, affidavits, etc., as well as to provide full opportunity to amend. In prescribing the thirty (30) day period the rule uses the word "shall" and we hold that it is mandatory and not discretionary.
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> [W]here there is the slightest possibility that the party opposing the motion for summary judgment has been denied the opportunity to file affidavits, take discovery depositions or amend, by the disposition of a motion for summary judgment without a thirty (30) day interval following the filing of the motion, it will be necessary to remand the case to cure such error.

Craven v. Lawson, 534 S.W.2d 653, 655 (Tenn. 1976). However, it has also been held that a failure to comply with Rule 56.04 does not require that a grant of summary judgment be set aside where the

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[6] Tenn. R. Civ. P. 56.04 states that "[t]he motion shall be served at least thirty (30) days before the time fixed for the hearing."

[7] Tenn. R. Civ. P. 6.05 states that "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon such party and the notice or paper is served upon such party by mail, three days shall be added to the prescribed period."

record does not contain any indication that the nonmoving party opposed the hearing of the motion within the 30-day period, requested a continuance, or was prejudiced by the premature hearing. *See* ***Teachers Ins. & Annuity Ass'n v. Harris***, 709 S.W.2d 592, 595 (Tenn. Ct. App. 1985).

The plaintiff argues that, because she did not receive proper notice, the trial court incorrectly held the hearing on State Farm's motion on September 5, 2003. State Farm's certificate of service states that the motion was served by personal delivery *or* by mail. Since the certificate of service prepared by State Farm's counsel is ambiguous with respect to the method of service, we construe it liberally in favor of the plaintiff. Thus, we assume service was by mail. We note that such an assumption is consistent with the assertion of plaintiff's counsel that the notice was found in his mailbox. Under Tenn. R. Civ. P. 6.05, the plaintiff was entitled to insist that the hearing on State Farm's motion not be held until after the expiration of the 33-day period. Assuming, as we must, that the motion was *mailed* on August 4, 2003, the hearing was held one day too soon.

We recognize that Tenn. R. Civ. P. 56.04 is mandatory. However, in light of ***Harris***, we are not required to automatically set aside a grant of summary judgment simply because the rule was not followed. ***Harris***, 709 S.W.2d at 595. There is nothing in the record to substantiate the assertion in the plaintiff's brief that the trial court refused to grant her request for a continuance. *See* ***Home Fed. Bank v. First Nat'l Bank of LaFollette***, 110 S.W.3d 433, 440 n.5 (Tenn. Ct. App. 2002). ("[A]ssertions in briefs do not constitute facts that we can consider on appeal.") The record before us also fails to demonstrate that the plaintiff objected to the hearing being held on September 5, 2003. Furthermore, we find no evidence of prejudice to the plaintiff by a hearing held one day early. The subject accident occurred on May 26, 1993. The hearing was held on September 5, 2003, some 10 years and 3 months later. The lack of one more day to prepare for a motion hearing can hardly be considered prejudicial under the facts of this case. Accordingly, we conclude that the trial court did not commit reversible error in considering State Farm's motion one day early.

B.

The plaintiff also argues that the trial court abused its discretion in refusing to consider her response to State Farm's motion for summary judgment because the response was filed on the day of the hearing.

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made." ***State v. Scott,*** 33 S.W.3d 746, 752 (Tenn. 2000); ***State v. Gilliland***, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." ***State v. Shirley,*** 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. ***Myint v. Allstate Ins. Co.,*** 970 S.W.2d 920, 927 (Tenn. 1998).

The plaintiff admitted that she did not comply with Tenn. R. Civ. P. 56.03, which states that "[a]ny party opposing the motion for summary judgment must, not later than *five days* before the hearing, serve and file a response to each fact set forth by the movant . . . ." (Emphasis added). The trial court properly applied Tenn. R. Civ. P. 56.03 as a basis for refusing to consider the plaintiff's response. We cannot say that the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the" plaintiff. ***Shirley***, 6 S.W.3d at 247 (quoting ***State v. Shuk***, 953 S.W.2d 662, 669 (Tenn. 1997)). Accordingly, we hold that the trial court did not abuse its discretion when it refused to consider the material filed by the plaintiff on the day of the hearing.

IV.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Melanie Millsaps. This case is remanded for collection of costs assessed below, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE